IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6405 OF 2003

1. Nitin Agro Engineers
2. Shri Gajanan Pingale ...Petitioners

Vs.

Galanwadi No.2 Sahakari Pani
Puravtha Santha Ltd.,Pune
through its Chairman ...Respondent

Shri R.G.Ketkar for the Petitioners.

CORAM: ABHAY S.OKA, J.

DATE: DECEMBER 22,2004.

JUDGMENT :

1. After hearing the matter for some time on 10th December 2004, I had kept the matter on 16th December 2004 and 17th December 2004. Today, I have heard further submissions of the learned Counsel appearing for the Petitioners.

2. By the impugned Judgment and Order, the learned Trial Judge has rejected the application for amendment of the written statement by which a prayer was made for incorporating the counter claim in the written statement. The said application has been rejected on various grounds.

3. It is to be noted here that the suit was filed by the Respondent in the year 1992 and the written statement was filed by the Petitioners on 20th March 1993. After about eight years, On 5th March 2001 an application for amendment has been made. The learned Judge has framed issues on 28th April 1993 and the suit is ready for hearing.

4. There is a prima facie finding recorded by the learned Judge that the cause of action has arisen long after written statement was filed by the Petitioners. There is prima facie finding recorded by the learned Judge that the counter claim was barred by limitation.

5. Considering the fact that the issues are framed more than 11 years back and the application is filed belatedly, I am not inclined to entertain this Petition under Article 227 of Constitution of India. If the Petitioners are so advised and in the event the Decree passed in the suit is adverse to the Petitioners, the order impugned can be always challenged in an Appeal which will be preferred by the Petitioners against the Decree passed in the suit.

6. It is also open for the Petitioners to file a separate suit praying for the reliefs sought to be claimed in the counter claim. If separate suit is filed, the observations which are made by the learned Judge regarding bar of limitation will not come in the way of the Petitioners as the

said observations are made only for limited purposes of considering the application for amendment. The issue of limitation, if any, in such a suit will have to be considered independently.

7. Hence I pass the following order :

i) Writ Petition is not entertained and same is rejected with no order as to costs.

ii) In case the suit is decided against the Petitioners, It will be open for the Petitioners to challenge the impugned Judgment and Order in an Appeal which may be preferred by the Petitioners for challenging the Decree passed in the suit.

iii) It will also be open for the Petitioners to file a substantive suit praying for the reliefs which were sought to be claimed by the counter claim. If such a suit is filed, the learned Trial Judge will decide the same without being influenced by the observations made in the impugned Judgment and Order and in particular the prima facie finding recorded regarding bar of limitation. The issue of limitation, if any, in such a suit will be decided on its own merits.

iv) All questions on merit of the proposed counter claim are expressly kept open.

v) Parties to act upon an authenticated copy of this Judgment.

Judge.